FILE COPY

Office Supreme Court, U.S.
FILED
APR 20 1961
JAMES R. BROWNING, Clerk

No. 838

In the Supreme Court of the United States

OCTOBER TERM, 1960

WHDH, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
RICHARD A. SOLOMON,
Attorney,
Department of Justice, Washington 25, D.C.

MAX D. PAGLIN,
General Counsel,
DANIEL R. OHLBAUM,
Assistant General Counsel,
RUTH V. REEL,
Counsel,
Federal Communications Commission,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Argument	9
Conclusion	15

CITATIONS

Cases:

Cobbledick v. *United States*, 309 U.S. 323	15
Fleming v. *Federal Communications Commission*, 225 F. 2d 523	11–12
Ford Motor Co. v. *National Labor Relations Board*, 305 U.S. 364	10
Myers v. *Bethlehem Corp.*, 303 U.S. 41	15
Parr v. *United States*, 351 U.S. 513	15
Sangamon Valley Television Corp. v. *United States*, 358 U.S. 49	10, 11
Scripps-Howard Radio v. *Federal Communications Commission*, 316 U.S. 4	11
United States v. *Shotwell Manufacturing Co.*, 355 U.S. 233	11
United States Alkali Ass'n v. *United States*, 325 U.S. 196	15
WKAT, Inc. v. *Federal Communications Commission*, 258 F. 2d 418	14
WORZ, Inc. v. *Federal Communications Commission*, 358 U.S. 55	10, 11

591323—61——1

Statutes:

	Page
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq*	3
Section 402(a)	11
Section 402(b)	11
Section 402(j)	12
Judical Review Act of 1950, 64 Stat. 1129, 5 U.S.C. 1031 *et seq*	3
Section 7	11

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 838

WHDH, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 1a–24a)[1] remanding the cases to the Federal Communications Commission for further hearing is reported at 261 F. 2d 55. The court's order (Pet. App. 124a–126a) approving the Commission's Report and Recommendation on remand, vacating the Commission's order on appeal, and remanding the case for further comparative hearing has not been officially reported. The original decision and order of the Commission are reported at 22 F.C.C. 761. The Commission's

[1] The petitioner has filed a separate appendix to the petition, referred to as "Pet. App."

decision on remand (Pet. App. 90a–108a) is reported at 29 F.C.C. 204, and its opinion and order denying rehearing (Pet. App. 117a–120a) at 29 F.C.C. 986.

JURISDICTION

The order of the court of appeals remanding the cases to the Commission was entered on July 31, 1958. The order of the court approving the Commission's Report and Recommendation on remand, vacating the order of the Commission on appeal, and remanding the proceeding for further comparative hearing was entered on January 19, 1961. Rehearing was denied on February 16, 1961. The petition for a writ of certiorari was filed on March 21, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 47 U.S.C. 402(j).

QUESTION PRESENTED

The court of appeals, though otherwise approving a decision of the Federal Communications Commission making an award to petitioner in a comparative television proceeding, remanded the case for further hearing to establish the facts, and make recommendations, with respect to allegations that during the Commission proceedings the principals of some of the applicants, including the petitioner, had made *ex parte* representations to a Commissioner. After hearing, the Commission reported to the court its findings that two of the applicants, including the petitioner, were responsible for *ex parte* attempts to influence the Commissioner. These activities, the Commission reported, rendered the grant to petitioner voidable and required a new comparative evaluation in which the

ex parte actions would reflect adversely upon the responsible parties. The court of appeals approved the Commission recommendation, vacated the original Commission grant to petitioner, and remanded the case for Commission re-evaluation of the comparative qualifications of the applicants on the basis of the original record as supplemented by the record on remand. The question now presented is:

Whether the court of appeals had authority to vacate the original Commission decision and remand the case for further comparative determination where (a) the matter upon which the remand was based was first raised *sua sponte* by the court, and (b) the court approved the report and recommendation of the Commission on remand without briefing and oral argument.

STATUTES INVOLVED

Pertinent sections of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*) and of the Judicial Review Act of 1950 (64 Stat. 1129, 5 U.S.C. 1031–1042), are set forth in the petition (pp. 19–23).

STATEMENT

On April 25, 1957, the Commission rendered its decision (22 F.C.C. 761) after a comparative hearing for a new television station on Channel 5, Boston, Massachusetts. The Commission granted the application of petitioner, WHDH, Inc., and denied the competing applications of Greater Boston Television Corporation (Greater Boston), Massachusetts Bay Telecasters, Inc. (Massachusetts Bay), and Allen B. DuMont Laboratories, Inc. Appeals to the court

below, in which petitioner WHDH was granted leave to intervene, were taken by Greater Boston and Massachusetts Bay under Section 402(b) of the Communications Act (Pet. 19).

On July 31, 1958, the court of appeals issued its decision ruling that it would have affirmed the Commission on the basis of the record on which the Commission had decided the case but that a remand to the Commission for further hearings was required by the indication of after-discovered circumstances which, if established, went to the core of the Commission's quasi-judicial powers (Pet. App. 1a–24a). The court noted that, subsequent to the Commission's disposition of this proceeding, testimony by a member of the Commission before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce indicated that various individuals connected with some of the parties to the proceeding had conferred with him with reference to the case while the matter was still under consideration by the Commission (Pet. App. 20a–24a).[2] In the light of this testimony, the court of appeals remanded the case to the Commission to hold an evidentiary hearing and make findings on the following issues (Pet. App. 25a–27a):

> (1) Whether or not any *member* of the Commission should have disqualified himself in the present case;
>
> (2) Whether any *person* or *persons* influenced or attempted to influence any member of the

[2] The transcript of the Congressional hearings had been lodged with the court by the Commission in connection with another case (Pet. App. 20a).

Commission in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 534–35, 540–41 (3rd Cir. 1958), and if so, the full facts and circumstances;

(3) Whether any *party* to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct which may be found by the Commission to have occurred;

(4) Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston, was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant or more than one may have been disqualified to receive a grant of its application; and

(5) Whether the conduct of any party-applicant if not of a disqualifying character, has been such as to reflect adversely upon such party-applicant from a comparative standpoint.

The court further directed that the *status quo* in these cases be maintained pending its further order, and retained jurisdiction of the appeals pending receipt of the findings and final report of the Commission (Pet. App. 26a).

Pursuant to the remand, the Commission designated the matter for hearing before a special hearing examiner, retired Chief Judge Horace Stern of the Pennsylvania Supreme Court. On September 23, 1959, the hearing examiner rendered an initial decision which proposed to affirm the Commission's grant to petitioner WHDH, Inc. (Pet. App. 40a–65a). Following

exceptions and oral argument, the Commission on July 14, 1960, issued its Decision and Order determining that the grant to petitioner WHDH was voidable and should be set aside (Pet. App. 90a–108a). The Commission found that principals of WHDH and Massachusetts Bay had attempted to influence its original decision by means other than the recognized and public processes of adjudication and that their conduct, while not disqualifying, was such as to reflect upon them adversely from a comparative standpoint (Pet. App. 99a–103a). It further concluded that vacation of the grant to petitioner WHDH was warranted to protect the integrity of the Commission's processes (Pet. App. 101a–102a). Accordingly, the Commission's order vacated its April 1957 grant to petitioner, scheduled further proceedings to reevaluate the comparative positions of all the applicants, and granted petitioner special temporary authority to continue its operations on Channel 5 pending a final order of the Commission (Pet. App. 104a).

On July 21, 1960, the Commission filed a "Further Report of Progress" with the court of appeals, stating that it did not view its Decision and Order of July 14, 1960 as the "final report" required by the court's remand order of July 31, 1958, and that such final report would be submitted upon completion of the further comparative proceedings (Pet. App. 109a–110a). By order of October 7, 1960, the court of appeals stayed the effectiveness of the Commission's order of July 14, 1960, pending further order of the court, and directed the Commission to submit its findings and recommendations on the specified remand

issues within thirty days (Pet. App. 115a–116a). The court stated that this action was required in the interest of orderly procedure and to give effect to its July 31, 1958, order directing the preservation of the *status quo* pending the court's further action (Pet. App. 116a). The court further stated that, after considering the findings and recommendations of the Commission, it might "wish to specify issues for briefing and oral argument or to make such other disposition as may be deemed appropriate" (*ibid.*).

On November 7, 1960, the Commission filed its "Report and Recommendation" in the court of appeals (Pet. App. 120a–124a). On the basis of its Decision of July 14, 1960, and a Memorandum Opinion and Order of November 1, 1960 denying rehearing, the Commission reported its findings and conclusions on the issues specified by the court as follows (Pet. App. 122a):

ISSUE 1

No member of the Commission, who participated in the instant case, should have disqualified himself.

ISSUE 2

There were attempts to influence members of the Commission, but no actual influence occurred. Robert B. Choate, a principal of WHDH, Inc., and Forrester A. Clarke, a principal of Massachusetts Bay Telecasters, attemped to influence the Commission's original decision of April 25, 1957, by means other than the recognized and public processes of adjudication. Moreover, William Davis Taylor and John S. Taylor, respectively the president and

vice-president of Globe Newspaper Company (which was not an applicant in this proceeding), made calls on each of the Commissioners in an attempt to prevent an award to WHDH. No member of the Commission was in fact influenced by any of the foregoing activities. The full facts and circumstances surrounding such activities are set forth in our Decision of July 14, 1960 and Memorandum Opinion of November 1, 1960.

ISSUE 3

Robert B. Choate is a principal of WHDH, Inc. and Forrester A. Clarke is a principal of Massachusetts Bay Telecasters. Their conduct is accordingly attributable to such parties. Globe Newspaper Company was not an applicant in this proceeding and its representatives did not act in connivance with any applicant.

ISSUE 4

In the light of the findings on the above issues and all the circumstances, we have concluded that the grant to WHDH was not void *ab initio* and that none of the applicants is disqualified to receive a grant of its application. We have, however, concluded that the grant to WHDH is voidable and that action should be taken to set it aside.

ISSUE 5

The conduct of WHDH and of Massachusetts Bay Telecasters, while not disqualifying, has been such as to reflect adversely upon such applicants from a comparative standpoint.

The Commission recommended that, in accordance with the views expressed in its Decision and Memorandum Opinion, the court remand the entire matter to the Commission in order that it might set aside the grant to petitioner, conduct further comparative proceedings, and make a new determination (Pet. App. 124a).

By order of January 19, 1961, the court of appeals, after consideration of the Commission's findings and recommendation, approved them (Pet. 124a–126a). The court's order vacated the Commission's original order of April 25, 1957, which had granted a permit to petitioner, and remanded the proceedings to the Commission in order that it might reevaluate the comparative positions of the applicants on the basis of the record as supplemented and make a new determination in the light thereof, and take such further action, if any, as the Commission should deem appropriate (Pet. App. 126a). On February 16, 1961, the court of appeals denied petitioner's petition for rehearing and other relief (Pet. App. 126a).

ARGUMENT

The petition seeks review of an order directing further proceedings before the Federal Communications Commission in order to enable the Commission to determine the impact of new information going to the heart of the comparative evaluation of the applicants. This order was well within the scope of the court's authority in reviewing administrative action. Furthermore, it is interlocutory, and petitioner has shown no reason warranting review by this Court prior

to final action by the Commission and subsequent review by the court of appeals.

1. The 1958 and 1961 remand orders of the court below are in accord with "familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied" or "to the end that valid and essential findings may be made." *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373, 374. The ends of justice obviously demanded that course here. The testimony before the Legislative Oversight Subcommittee to the effect that petitioner and other persons had conferred with Commissioners *ex parte* during the pendency of the quasi-judicial administrative proceeding, was ample justification for the court's 1958 order that the Commission supplement the record on appeal as to these matters which first came to light after the Commission's decision was on appeal.[3]

Indeed, the course followed by the court of appeals was completely in accord with the action of this Court in *WORZ, Inc.* v. *Federal Communications Commission,* No. 349, October Term, 1958, and *Sangamon Valley Television Corp.* v. *United States,* No. 235, October Term, 1958. In those cases, where certiorari was sought to review orders of the court of appeals affirming Commission decisions, this Court, upon representations by the Solicitor General concerning conduct similar to that involved here, vacated the

[3] Petitioner did not seek review by this Court of the 1958 order of the court of appeals which first remanded the case to the Commission for additional proceedings.

judgment of the court of appeals and remanded for such action as might be appropriate. *WORZ, Inc.*, 358 U.S. 55; *Sangamon Valley Television Corp.*, 358 U.S. 49.

Petitioner's contention (Pet. 12–13) that the court of appeals lacked power to remand for additional evidence, in the absence of an express authorization in the review provisions of Section 402(b) of the Communications Act, is analogous to the argument concerning the court's stay powers under the then language of Section 402(b) which was rejected in *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 11–14, 16–17. The review provisions are not to be read so narrowly and rigidly.

For the same reason, the fact that Section 402(a) of the Communications Act provides for review of some other types of Commission orders under Section 7(c) of the Judicial Review Act of 1950, 5 U.S.C. 1037(c), which specifically authorizes a remand without reversal, does not help petitioner. The court of appeals correctly determined below (Pet. App. 23a) that "what was explicit as an added procedural course in a section 402(a) review was implicit in the exercise of our review function * * * in a section 402(b) appeal." Absent an express statutory prohibition, the reviewing court is not deprived of conventional and appropriate "means for vindicating the public interest" or for preserving the integrity of the administrative and judicial process. *Scripps-Howard, supra*, 316 U.S. at 15; *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 241, *et seq.*; *Flem-*

ing v. *Federal Communications Commission*, 225 F. 2d 523, 526 (C.A.D.C.).

2. If the court of appeals' action of January 19, 1961, approving the Report and Recommendation of the Commission (Pet. App. 124a–126a) constituted a final determination of the validity of the Commission holding that the actions of petitioner WHDH's principal in engaging in two *ex parte* conferences with former Chairman McConnaughey was improper, and, while not disqualifying, required a new comparative evaluation of the applicant's qualifications, we should agree that serious questions ripe for review might well be presented since petitioner did not have an opportunity to present its case on these issues to the court of appeals. The fact that WHDH might nevertheless prevail on the new hearing, under the new criteria, would not deprive the court's order of finality any more than is normally the case where a final Commission decision on the merits is set aside and the case remanded for further proceedings (in the light of the court's opinion) which might result in reaffirmation of the original award. See Communications Act, Section 402(j), 47 U.S.C. 402(j).

But we do not read the court's order as being intended to have, or as having, the effect of passing judicially in any way upon the consequences of petitioner's actions as found by the Commission. Rather, the court was merely clearing the way toward the new hearings which the Commission desires to hold. In 1958, the court, in remanding, could have expressly provided that *if* the Commission should determine that the *ex parte* contacts, although not disqualifying,

required a new comparative hearing, the Commission could undertake such a new hearing. If that had been the court's order in 1958, there would be no doubt that after making the appropriate findings the Commission could set a new hearing, without seeking further permission of the court, and the whole matter would thereafter be open for judicial review upon the new order entered by the Commission at the close of that new hearing. In our view, that is all that the court has done here, in 1961 instead of 1958. It has given the Commission permission to hold the new hearing which the Commission believes necessary, but the court itself has not passed upon the evidence or the findings which led the Commission to conclude that a new hearing should be held.

If the court had intended finally to pass upon the validity of the Commission's determinations as to the effect of the actions of WHDH and Massachusetts Bay upon the validity of the original decision and their respective applications, it surely would have done so only after permitting all parties to be heard.[4] Such a hearing, by brief or oral argument, would have provided an opportunity for the parties to argue that the conduct revealed by the record on remand[5] either required the absolute disqualification of one or more

[4] As well as the *amicus*, the United States, which on October 14, 1960, had been permitted to intervene "to file briefs and to participate in oral argument" (Pet. App. 117(a)).

[5] The clerk's office of the court of appeals has advised us that while the Commission transmitted the record on remand to the court for filing on November 7, 1960, it has not in fact as yet been accepted for filing. It would appear, therefore, the Commission record on remand was not before the court when it adopted the order here in question.

of the parties (as other parties were urging) or that no impropriety, and hence no comparative demerit, was involved (as WHDH and Massachusetts Bay were arguing with respect to themselves). This is the procedure which the court of appeals followed in another case involving allegations of *ex parte* representations (the Channel 10 Miami proceeding, see *WKAT, Inc.* v. *Federal Communications Commission*, 258 F. 2d 418 (C.A.D.C.)), upon which the Commission made its report on remand at approximately the same time as the one in this case. It seems clear that the court's failure to hear argument here was because it intended to defer all such considerations pending the outcome of the further hearing by the Commission, and that it adopted a different procedure in the other *ex parte* case (*WKAT, Inc., supra*) involving the Commission because there it had been proposed to disqualify all but one party and no further Commission proceedings were contemplated.

Accordingly, petitioner's contentions (Pet. 10–17) present nothing warranting review by this Court prior to final Commission action in the renewed comparative proceeding and any subsequent review by the court of appeals. Petitioner has not shown any compelling need for an immediate determination,* or that it

* The fact that the court, in its January 19, 1961 order, vacated the Commission's original grant (as the Commission had stated it intended to do itself (Pet. App. 124a)) does not jeopardize petitioner WHDH's position. WHDH has remained in operation and the Commission has announced its intention of granting WHDH special temporary authority to continue operation on Channel 5 in Boston pending the final order of the Commission in the renewed comparative hearing (Pet. App. 104a, 109a, 124a; see R. 1172D). The court of

would be precluded from asserting these challenges should its application ultimately be denied. Under these circumstances review now would thwart the longstanding Congressional policy against piecemeal appeals and delay the further proceedings before the Commission. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50–51. Cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324–326; *United States Alkali Ass'n.* v. *United States*, 325 U.S. 196, 202–203; *Parr* v. *United States*, 351 U.S. 513.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Assistant General Counsel,

RUTH V. REEL,
Counsel,
Federal Communications Commission.

APRIL 1961.

---

appeals' order of January 19, 1961, does not require cessation of operations by WHDH. On the contrary, to the extent that any court authorization for continued WHDH operation may be deemed necessary, it is provided by the final provision of the order authorizing the Commission to "take such further action, if any, as the Commission shall deem appropriate" (Pet. App. 126a).

U. S. GOVERNMENT PRINTING OFFICE: 1961